SABAH SHIPBUILDING REPAIRING & ENGINEERING SDN. BHD. v. PERNAS HALL THERMOTANK ENGINEERING SDN. BHD.

[O.C.J. (George J.) December 19, 1984]

[Kuala Lumpur – Civil Suit No. C 1828 of 1982]

Contract – Civil engineering works – Subcontracted – Agreement providing for payment in respect of variations – Extra payment demanded for alleged variations.

In this case the defendants had sub-contracted certain building works to the plaintiffs and the claim of the plaintiffs was in respect of certain variation works carried out without the knowledge or consent of the defendants. There were provisions in the agreement for variations as per architect's instruction or deemed to be as such instruction. The Senior Assistant Registrar gave summary judgment in favour of the plaintiffs. The defendants appealed.

Held: (1) the plaintiffs have not shown that those variations were pursuant to Architect's instructions or that they have to be deemed to be pursuant to such instructions;

(2) certain documents received by the plaintiffs were marked variation orders; but what the terms of variations were or who gave them have not been disclosed;

(3) whether the works carried out by defendants were variations is a *bona fide* triable issue.

The summary judgment pronounced by Senior Assistant Registrar was set aside and the appeal allowed with costs.

CIVIL SUIT.

Prasad S. Abraham for the defendants/appellants.

Lim Kian Leong for the plaintiffs/respodents.

Cur. Adv. Vult.

George J. : The Senior Assistant Registrar had given summary judgment to the plaintiffs pursuant to an Order 14 application. The defendants appealed.

The plaintiffs' claim against the defendants was for the sum of $49,810.16 being, according to paragraph 3 of the statement of claim, "the balance sum due on goods sold and delivered to the defendant and services rendered by the plaintiff to the defendant at its request, full particulars of which have been rendered by the plaintiff to the defendant".

By the statement of defence paragraph 3 was denied. The defendants went on to explain that the defendants had subcontracted certain building works to the plaintiffs and the claim of the plaintiffs was in respect of certain "variation works" alleged to have arisen out of the subcontracted works and said to have been carried out by the plaintiffs. The defendants contend that extra works carried out was presumably for the defendants' principals, but without the knowledge or consent of the defendants and it was contended that accordingly the defendants are not liable to the plaintiffs for the cost of those variation or extra works.

The documents exhibited to the affidavit of Chok Kon Phin filed in support of the application for summary judgment shows that one Koperasi Pembangunan Desa had appointed the defendants Pernas Hall Thermotank Engineering Sdn. Bhd. as main contractors in respect of certain civil engineering works. The defendants as such main contractors had in turn appointed the plaintiffs as subcontractors in respect of some of the said works on a lump sum basis.

There were provisions in the terms of the subcontractual agreement for variation in respect of the works. Variations had to be as per architect's instructions or deemed to be per such instructions.

Certain variations to the original works were, it would appear, carried out by the plaintiffs. The plaintiffs have not shown that those variations were pursuant to architect's instructions or that they have to be deemed to be pursuant to such instructions. I was far from satisfied that the documents held out in paragraph 4 of the affidavit of Chok Kon Phin to be variation orders, are in fact variation orders. CKP2 to CKP7 clearly appear to be quotations. CKP8 to CKP11 appear to be either quotations or invoices. The best that can be said for the plaintiffs in respect of those documents are that each of them refers to "variation orders". What the terms of the variation orders were or who gave them have not been disclosed. And in the face of the denial by the defendants that the works alleged to have been carried out were variations within the meaning of the terms of the contract between the parties, I was of the view that there was a *bona fide* triable issue.

The defendants' appeal from the order of the Senior Assistant Registrar of August 17, 1984 was allowed with costs. The summary judgment pronounced by the Senior Assistant Registrar on August 17, 1984 was set aside and the defendants were given unconditional leave to defend the action.

Order accordingly.

Solicitors : *Abraham & Partners; Shearn Delamore & Co.*